Nos. 89-1502, 89-1503 and 89-1484

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN STOCK EXCHANGE, INC., ET AL., PETITIONERS

v.

CHICAGO MERCANTILE EXCHANGE, ET AL.

PHILADELPHIA STOCK EXCHANGE, INC., PETITIONER

v.

CHICAGO MERCANTILE EXCHANGE, ET AL.

INVESTMENT COMPANY INSTITUTE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether financial instruments known as "index participations" are subject to the jurisdiction of the Securities and Exchange Commission, or, alternatively, are subject to the exclusive jurisdiction of the Commodity Futures Trading Commission as "involving contracts of sale of a commodity for future delivery" (7 U.S.C. 2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25)[1] is reported at 883 F.2d 537. An opinion denying the

[1] "Pet. App." refers to the appendix jointly filed by the petitioners in Nos. 89-1502 and 89-1503.

petitions for rehearing (Pet. App. 108-111) is reported at 883 F.2d 550. The orders of the Securities and Exchange Commission (Pet. App. 26-83, 84-107) are published at 54 Fed. Reg. 15,280 and 54 Fed. Reg. 15,575, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1989. The petitions for rehearing were denied on October 23, 1989. On January 12, 1990, Justice Stevens signed an order extending the time within which to file a petition for a writ of certiorari for the petitioners in No. 89-1502 to and including March 22, 1990, and the petition was filed on that date. On January 17, 1990, Justice Stevens signed an order extending the time within which to file a petition for a writ of certiorari for the petitioner in No. 89-1503 to and including March 26, 1990, and the petition was filed on that date. On January 19, 1990, Justice Stevens signed an order extending the time within which to file a petition for a writ of certiorari for the petitioner in No. 89-1484 to and including March 22, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the interpretation of the statutes governing the jurisdiction of the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). Specifically, the question presented is which agency enjoys regulatory jurisdiction over recently invented financial products known as "index participations".

1. a. The SEC is, of course, charged with responsibility for regulating transactions in securities under the federal securities laws.[2] In the securities laws, Congress "enacted a definition of 'security' sufficiently broad to encompass virtually any instrument that might be sold as an invest-

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[2] *E.g.*, the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*

ment." *Reves* v. *Ernst & Young*, 110 S. Ct. 945, 949 (1990). A security is defined to include, *inter alia*, "any * * * stock, * * * any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), * * * or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in * * * any of the foregoing [.]" 15 U.S.C. 78c(a)(10).

The CFTC was created in 1974 as an independent federal agency vested with the exclusive authority to regulate trading in futures contracts, a function that had long been carried out by the Department of Agriculture. Commodity Futures Trading Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389. Congress's purpose in amending the Commodity Exchange Act (CEA) to create the CFTC was to establish a "comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." H.R. Rep. No. 975, 93d Cong., 2d Sess. 1 (1974); *CFTC* v. *Schor*, 478 U.S. 833, 836 (1986). Under the CEA, the CFTC has "exclusive jurisdiction * * * with respect to * * * transactions involving contracts of sale of a commodity for future delivery." 7 U.S.C. 2.

b. In 1981, a disagreement arose between the CFTC and SEC over which agency had authority to regulate trading in a particular financial product. The SEC had approved trading on a securities exchange of standardized options on mortgage-backed debt securities guaranteed by the Government National Mortgage Association (GNMA). In a challenge brought by the Chicago Board of Trade, the Seventh Circuit set aside the SEC's orders on the ground that GNMA options involved futures contracts, the regulation of which was entrusted to the CFTC. See *Board of Trade* v. *SEC*, 677 F.2d 1137 (1982), vacated as moot, 459 U.S. 1026 (1982).[3]

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[3] The Solicitor General filed a petition for a writ of certiorari on the SEC's behalf in that case. *SEC* v. *Board of Trade of the City of Chicago, et al.*, No. 82-526. The enactment of legislation superseding the court of appeals' ruling rendered the case moot.

While the litigation was pending, the CFTC and SEC reached an agreement, known as the Shad-Johnson Accord, on how to divide their respective jurisdictions with respect to options on securities and certain other securities-derivative products. Congress subsequently enacted legislation that, in essence, implemented the agencies' agreement.[4] The legislation "clarified" that the SEC would regulate "options on all securities, and securities groups and indices," H.R. Rep. No. 626, 97th Cong., 2d Sess. Pt. 1, at 10-11 (1982), while the CFTC would regulate "futures contracts on broad based groups or indices of any securities as well as options on any such futures contracts." H.R. Rep. No. 626, *supra*, Pt. 2, at 2. See also S. Rep. No. 384, 97th Cong., 2d Sess. 21-24 (1982); H.R. Rep. No. 565, 97th Cong., 2d Sess. Pt. 1, at 38-40 (1982).[5]

2. In the late winter and spring of 1988, several stock exchanges sought the SEC's approval to list index participations for trading. In accordance with 15 U.S.C. 78s(b), the SEC published notice of the proposals in the Federal Register.

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and, accordingly, this Court vacated the judgment. 459 U.S. 1026 (1982).

[4] See Act of Oct. 13, 1982, Pub. L. No. 97-303, 96 Stat. 1409 (amending the federal securities laws); Act of Jan. 11, 1983, Pub. L. No. 97-444, 96 Stat. 2294 (amending the Commodity Exchange Act).

[5] Pursuant to the Accord, the SEC was granted jurisdiction to regulate "the trading of any put, call, straddle, option, or privilege on any security * * * or group or index of securities (including any interest therein or based on the value thereof)," 15 U.S.C. 78i(g), while such jurisdiction was withheld from the CFTC. 7 U.S.C. 2a(i). The CFTC, in turn, was given "exclusive jurisdiction with respect to * * * transactions involving * * * contracts of sale * * * for future delivery of a group or index of securities (or any interest therein or based on the value thereof) [.]" 7 U.S.C. 2a(ii). Congress also conferred authority upon the SEC to disapprove applications to trade futures contracts based on the value of a group or index of securities (or options on such contracts) if the SEC determined that the statutory requirements for such contracts (or options) were not satisfied in a particular case. 7 U.S.C. 2a(iv)(II).

Index Participations (IPs) are standardized contracts based on the value of an index representing a portfolio of securities.[6] IPs do not represent ownership interests in an actual "market basket" of securities; rather, they provide vehicles for traders to experience gains or losses based on the performance of the underlying stock index (for example, the Standard & Poor's 500). The purchaser of an IP (the "long" or "holder") will profit from increases in the value of the index. The seller of an IP (the "short") will profit from a downturn in the index. With one exception, IPs do not involve any actual securities changing hands.[7] In addition, the shorts and longs do not deal directly with each other; after an IP contract is formed on an exchange, IPs are issued, cleared, and settled by a clearing corporation (here, the Options Clearing Corporation). IPs have no fixed expiration date; their existence is therefore—at least potentially—perpetual.

An IP holder acquires a contract by paying a market price that approximates the value of the index on the date of purchase, times a multiplier. The IP holder has two principal rights. First, the IP holder is entitled to "dividend-equivalent" payments approximating the cumulative dividends that would have accrued to a person owning a weighted basket of the securities in the index. Second, the IP holder may exercise the right to be paid the value of the index on a designated "cash out" date.[8]

[6] The following description of IPs is based on the SEC's orders (Pet. App. 27-24, 84-98), and a disclosure document prepared under the auspices of the Options Clearing Corporation (OCC) to describe IPs to potential traders (C.A. App. 545-559).

[7] The American Stock Exchange, Inc. (Amex) IP gave the holder the right to take delivery of the index stocks under certain circumstances. See Pet. App. 28-29.

[8] The particular dates varied among the stock exchanges. The Philadelphia Stock Exchange, Inc. (Phlx) IP provided a 100% cash-out privilege quarterly and a cash-out privilege at all other times for 99.5% of the value of the index. The Amex IP provided a quarterly cash-out privilege. The Chicago Board of Options Exchange, Inc. (CBOE) IP provided a semi-annual cash-out privilege.

An IP short makes the reciprocal promise to pay the value of the index if and when an exercise notice is assigned to him on a cash-out date, and to pay the dividend equivalents. At any time, a long or short IP position can be liquidated, and profits or losses realized, by entering into the opposite type of transaction on the exchange (a "closing" or "offset" transaction).

In response to the SEC's notice regarding IPs, the CFTC and two futures exchanges filed comments urging that IPs were futures, and therefore not subject to SEC jurisdiction. The same comments also urged that IPs were not "securit[ies]" under the federal securities laws. Pet. App. 37-38. The Investment Company Institute (ICI) submitted comments arguing that IPs were governed by the Investment Company Act. *Id.* at 37.

On April 11, 1989, the SEC approved the proposals to trade IPs, concluding that: (a) IPs are "securities," Pet. App. 47-53; (b) IPs are not "futures contracts" within the exclusive jurisdiction of the CFTC, *id.* at 53-66; and (c) IPs are not subject to regulation under the Investment Company Act, *id.* at 66-67. The SEC also found that IPs would provide advantages to retail investors seeking to invest in "the market", and that the trading of IPs might reduce stock market volatility. *Id.* at 68 & n.97.

3. The futures exchanges filed petitions for review in the Seventh Circuit, which set aside the SEC's orders.[9] The court of appeals framed the issue as whether IPs are futures contracts; if so, under the applicable jurisdictional provision, 7 U.S.C. 2, the CFTC's jurisdiction was exclusive, even if the instruments were also securities under the federal securities laws. Pet. App. 14.

The court noted that from the perspective of the holder of an IP, the instrument resembles an interest in a portfolio of stock, except that an IP confers no voting rights. From the perspective of the short, however, the court found that an IP resembles a futures contract because the

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[9] The CFTC filed a brief as amicus curiae, urging that IPs are futures contracts subject to its regulation.

short promises to make future delivery of the value of the underlying index. Pet. App. 14-16. Observing that neither the securities laws nor the CEA addressed such a product in a straightforward way, the court considered whether deference to the agencies' respective interpretations of their statutes was appropriate. Assuming without deciding that both the SEC and the CFTC were entitled to "some deference" in their competing claims to apply their statutes to IPs, the court concluded that "the IP is both a security and a futures contract." *Id.* at 20. The court explained that "[t]he only element of financial futures contracts that is missing is 'bilateralism,' " but that characteristic, the court stated, "is not essential to a futures contract." *Id.* at 21.[10] Applying the requirement in 7 U.S.C. 2 that the CFTC's jurisdiction is exclusive over products that are futures contracts, the court set aside the SEC's orders.[11]

ARGUMENT

The court of appeals held that an IP has attributes of both a security and a futures contract, and it ultimately concluded that under the regulatory schemes governing futures and securities, the CFTC has sole authority to regulate such instruments. Although the question decided by the court of appeals was a narrow one, its proper resolution is important to regulators, to the financial markets subject to their jurisdiction, and to the interpretation of the two statutory schemes in question. In the SEC's view, the court's holding is wrong and its under-

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[10] By the term "bilateralism," the court referred to the characteristic of an instrument that creates future obligations on both sides. The court agreed with the SEC that "IPs are not bilateral because the long performs in full by paying up front[.]" Pet. App. 16.

[11] The court therefore did not reach the ICI's contention that IPs created arrangements subject to the Investment Company Act. Pet. App. 25. The court subsequently filed an opinion denying the stock exchanges and the SEC's petitions for rehearing, in which it rejected additional arguments, *id.* at 108-109; two judges voted to rehear the case en banc. *Id.* at 100-111.

lying analysis creates a climate of uncertainty about the proper boundaries between its jurisdiction and that of the CFTC; this, the SEC strongly believes, will harm financial innovation, capital markets, and investors. The SEC continues to subscribe to the views expressed in its orders and believes that, in light of the importance of the issues presented, review by this Court is warranted. In the opinion of the CFTC, the decision below is correct, does not announce principles that extend the CFTC's jurisdiction to areas entrusted to other regulators, and will not harm the operations of the Nation's financial markets.

While the SEC's views about its statute and the industry it regulates are entitled to weight, we cannot agree with the SEC that the decision below is incorrect, or that the analytical framework it employed departed from the intent of Congress in dividing authority between the SEC and CFTC. In our view, the court of appeals properly applied the CEA in finding that IPs are "contracts of sale of a commodity for future delivery" within the sole regulatory authority of the CFTC. That holding rests on a natural interpretation of the language of the CEA, and it fully accords with Congress's purposes in entrusting the exclusive regulation of futures contracts to a specialized agency. Moreover, we do not believe that the opinion augurs a wholesale expansion of CFTC jurisdiction at the expense of other agencies. The opinion itself suggests limiting principles, and other limiting principles are likely to be developed.

It is possible that the development of some new financial products will be "chilled" (as the SEC believes has already occurred) by the imprecision of the analysis governing whether a product is a futures contract, although hard evidence in support of that proposition is difficult to come by. At bottom, however, such consequences, to the extent they do exist, raise policy questions appropriate for Congress, rather than this Court, to address. While we fully agree that it would be desirable to have clear standards to apply in predicting which agency has jurisdiction to regulate a particular

product, the statutory schemes at issue are not susceptible to such "bright-line" tests. Not only is some imprecision inherent in the language chosen by Congress, the difficulty is compounded by the rapid development of new financial instruments not envisioned when Congress fashioned the securities and futures statutes. Because the court below properly resolved the problem at hand, and did so on the basis of correct legal principles, we believe that review by this Court is not warranted.

A. The central submission of the stock exchanges is that IPs are not properly characterized as futures contracts within the meaning of the CEA. The classification of IPs, as the court of appeals recognized, presents something of a conundrum; it requires applying the concepts expressed in each statute to a novel instrument possessing characteristics of both a security and a futures contract, although it is not a conventional version of either. On balance, however, we believe that the language and purposes of the CEA support the court of appeals' holding that IPs are futures contracts.

1. Futures contracts have traditionally been employed by buyers and sellers of commodities to shift the risks posed by fluctuations in price, and by speculators to assume those risks in the hope of earning a profit. See 7 U.S.C. 5 (setting forth legislative findings); H.R. Rep. No. 975, *supra*, at 33-35; S. Rep. No. 1131, 93d Cong., 2d Sess. 9-14 (1974); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 357-360 (1982) (describing background and purposes of futures contracts). Congress has long provided for the regulation of futures contracts because of their risk-shifting benefits and because of the danger that excessive speculation or manipulation of the futures markets could undermine their utility. 7 U.S.C. 5.

As a general matter, "the seller of the [futures] contract commits himself to deliver the commodity at a fixed date in the future, while the buyer commits himself then to accept delivery and pay the agreed upon price." *Leist* v. *Simplot*, 638 F.2d 283, 286 (2d Cir. 1980) (Friendly, J.), aff'd *sub nom. Merrill Lynch, Pierce, Fenner &*

Smith, Inc. v. *Curran, supra.* Futures contracts are usually formed without the expectation that the seller will make or the purchaser take actual delivery; they have standardized terms to facilitate their liquidation through offsetting transactions in a contract market; they involve the payment by both parties of "margin" deposits to secure future obligations; and they serve the primary purpose of shifting the risk of a change in the value of a cash commodity.[12] Those traditional elements must be applied, however, with sensitivity to the economic purposes of futures contracts as vehicles for hedging or speculating on price changes in the underlying cash market. As the CFTC and the courts have emphasized, "no bright-line definition or list of characterizing elements is determinative." *CFTC* v. *Co Petro Marketing Group, Inc.*, 680 F.2d 573, 581 (9th Cir. 1982); *In re Stovall*, [1977-1978 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,779 (1979) ("We do not mean that all commodity futures contracts must have all of these elements").

Against that background, the language of the CEA is properly interpreted to apply to IPs. Congress broadly vested the CFTC with "exclusive jurisdiction * * * with respect to * * * transactions involving contracts of sale of a commodity for future delivery[.]" 7 U.S.C. 2.[13] The term "future delivery" is expressly subject only to the limitation that it "shall not include any sale of any cash commodity for deferred shipment or delivery"; this provision was designed to exclude "forward contracts,"

[12] See *CFTC* v. *Co Petro Marketing Group, Inc.*, 680 F.2d 573, 579-580 (9th Cir. 1982); *In re Stovall*, [1977-1978 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,777 (1979); *Policy Statement Concerning Swap Transactions*, 54 Fed. Reg. 30,694, 30,694-30,695 (1989) (CFTC release); 1 P. Johnson & T. Hazen, *Commodities Regulation* § 103, at 10-11 (2d ed. 1989); Gilberg, *Regulation of New Financial Instruments Under the Federal Securities and Commodities Laws*, 39 Vand. L. Rev. 1599, 1603 (1986).

[13] The term "contract of sale" is defined to include "sales, agreements of sale, and agreements to sell." 7 U.S.C. 2.

in which the parties contracting to sell a commodity actually expect to transfer the item, but, for reasons of convenience or necessity, postpone its delivery. 7 U.S.C. 2.[14] The term "commodity" is expansively defined to include "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. 2.

IPs are "contracts of sale"; they obligate the seller to "deliver" the value of a stock index on a future date; and the value of that index constitutes a "right" or "interest" under the CEA's definition of commodity. Moreover, there is no meaningful sense in which IPs can be considered forward contracts that are excluded from the CFTC's jurisdiction under 7 U.S.C. 2; the parties to an IP contract are not engaged in a commercial venture to buy and sell securities in the "cash" market, with delivery being deferred for reasons of convenience. Rather, the very purpose of the IP is to provide a way to earn profits (or limit losses) from changes in the value of the stock index, without owning the underlying shares. As such, IPs serve the quintessential function of futures contracts in transferring the risk of price change without transferring title to (or making delivery of) the underlying commodity.[15]

In its order, the SEC declared that IPs lack the "futurity" necessary to a futures contract because "an

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[14] See H.R. Rep. No. 975, *supra*, 129-130; *In re Stovall*, [1977-1978 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,777-23,778; 1 P. Johnson & T. Hazen, *Commodities Regulation* § 1.03, at 9-10 (2d ed. 1989). In contrast, in a futures contract, the typical expectation is that the contractual obligations will be extinguished by entry into an equal and opposite transaction on the exchange. *In re Stovall, supra.*

[15] IPs also have other features that support their treatment as futures contracts. They have standardized terms in order to facilitate trading. They are essentially instruments by which traders may hedge against, or speculate on, changes in the value of a commodity, namely, the value of the index. And the interests created in IPs can be extinguished (and their value realized) by offset transactions involving the purchase (or sale) of an equal and opposite contract.

IP contract represents the *present* obligation to pay or right to receive the *current* value of an underlying portfolio of securities." Pet. App. 55 (emphasis in original). However, it is undisputed that the IP holder has only the right to compel delivery of the value of the index on the cash-out dates. Those dates, as the court of appeals pointed out, "lie[] in the future to the same extent as the settlement date of any futures contract." *Id.* at 17.

The general purposes of the CEA are also served by applying its provisions to IPs. Cf. *Crandon* v. *United States*, 110 S. Ct. 997, 1001 (1990) (looking to "design of the statute as a whole and to its object and policy" in interpreting statutory language). One of the basic functions of futures markets is to permit owners of commodities to establish "hedges" against the risk of loss in the underlying "cash" market. See S. Rep. No. 1131, *supra*, at 11-15; 7 U.S.C. 5; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 390. Congress recognized that purpose in providing for separate regulation of futures markets and cash markets, and it applied the principle of separate regulation specifically to trading in securities and futures contracts based on securities.[16]

As with other stock-index futures contracts, one function of IPs is to serve as hedges for a portfolio of stock: the contracts sold by the IP short increase in value when the net value of the securities in the underlying index declines. Consequently, the owner of securities (such as a portfolio manager of a pension fund) can seek to protect against falling prices in the securities markets by selling IPs. In designing its product, at least one stock exchange explicitly took account of the utility of selling

[16] In connection with the 1982 Accord legislation, the Agriculture Committees of both the House and the Senate noted that "the CFTC will continue to retain its traditional role of regulating markets and instruments that serve a hedging and price discovery function while the SEC will primarily regulate markets and instruments with an underlying investment purpose." H.R. Rep. No. 626, *supra*, Pt. 2, at 3; S. Rep. No. 384, 97th Cong., 2d Sess. 22 (1982) (same); see also H.R. Rep. No. 565, 97th Cong., 2d Sess. Pt. 1, at 40 (1982) (same).

IPs as a hedge. See Pet. App. 30 (describing operation of CBOE's cash-out privilege when exercised by a "hedged [IP] short"). Because IPs permit the same type of hedging activity that characterizes the use of other futures contracts, it is consistent with Congress's purposes to allocate jurisdiction over IPs to the CFTC.[17]

Of course, the general allocation of hedging instruments to the CFTC is qualified by the fact that the SEC has jurisdiction to regulate options on securities (and on indices of securities), which also can be used as hedging instruments. See 15 U.S.C. 78c(a)(10); 15 U.S.C. 78i; H.R. No. 626, *supra*, Pt. 1, at 5 & n.8; Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission, and Securities and Exchange Commission, *A Study of the Effects on the Economy of Trading in Futures and Options*, 98th Cong., 2d Sess. 31-48 (Comm. Print 1985). But the point remains that it accords with Congress's purposes (as well as the literal text of the CEA) to construe the CEA to cover IPs. Congress elected to have the CFTC (not the SEC) be the primary regulator of "contracts of sale * * * for future delivery of a group or index of securities (or any interest therein or based upon the value thereof)." 7 U.S.C. 2a(ii). There is, therefore, no anomaly in holding that IPs, which fall within the statutory description of the CFTC's jurisdiction and can play the classic hedging role of a futures contract, should be regulated as futures.

2. Noting the differences between IPs and conventional futures contracts, petitioners contend (as did the SEC in its orders) that IPs are distinguishable from the instru-

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[17] The Amex asserted in the court below that IPs could not be used for hedging because the short must deposit 150% of the value of the contract upon its formation and thus must "commit *an even greater* amount of cash * * * for his 'insurance' than he paid for his cash product." Amex C.A. Reply Br. 10-11 (emphasis in original); see 89-1502 Pet. 14 n.16. That statement overlooks the fact that the short receives 100% of the value of the IP upon its sale; thus, the IP short is required only to add to that sum half of the value of his "cash product"—a commitment that is compatible with hedging.

ments traditionally subject to CFTC jurisdiction. The principal differences between IPs and traditional futures contracts are that (a) the long pays the entire purchase price when the contract is established (so that the contract is executory only for the short and is not "bilateral"); (b) the long is entitled to receive quarterly dividend-equivalent payments, and (c) the contracts do not have a fixed expiration date. Congress, however, did not specifically require any of these elements in order to have a futures contract.

In particular, Congress did not require "bilateralism," the feature on which petitioners lay the most emphasis. 89-1502 Pet. 19; 89-1503 Pet. 13. Had Congress desired a bilateralism requirement, it could easily have made the CFTC's jurisdiction applicable only to "contracts of sale * * * for future delivery *and payment*"; this would have required both the short and long to perform in the future, as petitioners would have it. But, of course, Congress did not include the italicized language in the statute. The statutory focus on futurity is solely on the short's obligation to make delivery. Nor did Congress express an intention to restrict the concept of a futures contract to its historical antecedents. Likewise, the CFTC—the agency charged with administering the CEA—does not require a fixed list of elements to trigger the statute's application, but looks to economic substance. *In re Stovall*, *supra*.

In the analogous area of the federal securities laws, the Court has refused to be "bound by legal formalisms, but instead take[s] account of the economics of the transaction under investigation." *Reves* v. *Ernst & Young*, 110 S. Ct. at 949; see *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943). A similar interpretive approach is warranted, and has been employed, in construing the CEA. See *CFTC* v. *Co Petro Marketing Group, Inc.*, *supra*. Although the distinct features of IPs may, *to a holder*, make IPs resemble an interest in a portfolio of stock (or in a stock mutual fund), they do not alter the essential nature of the promise by the short. The fact remains that the IP

short agrees to deliver a commodity on a future date, and that is the key characteristic for coverage set forth in the CEA.[18]

In concluding that "bilateralism" was not essential in order to have a futures contract, the court of appeals relied on authority interpreting the CFTC's jurisdiction in the context of an enforcement proceeding, where a broad reading of the CEA serves to prevent harm to traders. Pet. App. 21, citing *CFTC* v. *Co Petro Marketing Group, Inc., supra.* Contrary to views expressed to us by the SEC, we believe that reliance on such authority was appropriate in the context of this case.[19] The difference between enforcement proceedings and authorization of trading in a

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[18] None of the other differences between IPs and traditional futures contracts seems particularly essential to the instrument's classification. For example, "margin" in the IP context is said to regulate credit (as in stocks); it reflects the long's ability to use borrowed funds for the transaction. In the futures context, margin serves as a good-faith guarantee of future performance. The role played by margin in an IP, however, may be more a function of the intent to trade IPs as securities rather than an inherent attribute of the product. In any event, the purpose of requiring the IP short to deposit margin is to secure its future performance—a purpose that is fully consistent with the analysis of an IP as a futures contract.

The Amex IP permitted the long in certain circumstances to take physical delivery of stock rather than receive a payment representing the value of the index. A futures contract based on the value of an index of securities must be settled in cash, rather than by transfer of the underlying securities. 7 U.S.C. 2a(ii)(I). Rather than suggesting that the Amex IP is not a futures contract, however, the physical delivery feature makes the Amex IP a type of stock-index future that Congress did not intend to authorize.

[19] In the SEC's view, the broad construction given to the concept of a futures contract in the law enforcement context should not be applied in this case, where such a construction will defeat the SEC's jurisdiction over a particular instrument that the SEC has authorized for trading; the SEC believes that the legislative history of the CEA and, in particular, the "SEC savings clause," see pp. 20-23, *infra*, counsel against the application of the CEA to infringe on SEC jurisdiction.

new product should not change the definition of a futures contract.

It is true that this Court has noted that the question whether a particular instrument is a security requires consideration of "the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole." *Marine Bank* v. *Weaver*, 455 U.S. 551, 560 n.11 (1982). That principle provides leeway for viewing an instrument to be a security in some, but not all, contexts.[20] The Court, however, has never embraced the principle that generalized notions of public policy could justify construing an agency's jurisdiction broadly in the enforcement context (in order to protect traders against fraud), yet narrowly in the regulatory context (in order to avoid suppression of a product that a sister agency believes would be useful and might not otherwise be brought to market). Such flexibility might advance what courts or agencies perceive to be good policy, but it would do so at the expense of Congress's chosen policy. Here, moreover, the treatment of the CFTC's jurisdiction in such a malleable fashion would effectively produce a zone of *concurrent* jurisdiction between the CFTC and SEC that Congress quite deliberately foreclosed (see pp. 21-22, *infra*).[21]

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[20] For example, *Marine Bank* held that certificates of deposits (CDs) insured by the FDIC were not "securities" on the facts before the Court. Subsequently, the Second Circuit held that a firm's program to obtain CDs for customers and to create a liquid market for their resale did create "securities" under the Exchange Act. *Gary Plastic Packaging Corp.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 240-242 (1985) (viewing the arrangement as an "investment contract").

[21] A consistent interpretation of the CEA is also needed to avoid incongruous results. For example, under the SEC's "contextual" approach, the CFTC might have had power to assert exclusive jurisdiction over IPs if the SEC had not authorized their trading, but, given that the SEC had done so, the CFTC was ousted from exercising jurisdiction. We agree with the court below that "[e]ither IPs are futures contracts or they aren't";

The Court has sometimes found that coverage under the federal securities laws was not required because another scheme of regulation amply protected the parties in a particular setting.[22] It could be argued here that the jurisdiction of the CFTC should yield because a fully adequate scheme of regulation is available under the federal securities laws. Congress itself, however, determined that when the CEA and the securities laws both apply, the CEA's jurisdiction prevails. There is, therefore, no latitude for the creation of a new, non-statutory exemption from the CEA. See H.R. Conf. Rep. No. 1383, 93d Cong., 2d Sess. 35 (1974) (the CFTC's "jurisdiction over futures contract markets or other exchanges is exclusive" and "where applicable, supersedes State as well as Federal agencies").

Nor do we believe that the court of appeals erred in applying principles of deference to the agencies' interpretations of their statutes. In concluding that the CFTC had jurisdiction over IPs, the court of appeals assumed, without deciding, that both agencies were owed deference in construing their respective statutes to apply to IPs. Pet. App. 18-20. Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), an agency's reasonable interpretation of its governing statute is entitled to deference in areas where the statute is silent or ambiguous. We see no reason not to apply that principle to the statutory provisions here.[23] The SEC argued

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that determination cannot depend on which agency acts first in asserting jurisdiction. Pet. App. 22.

[22] See *Marine Bank*, 455 U.S. at 558 (certificate of deposit was not a security in part because of the scheme for regulation of that instrument under federal banking laws); *Teamsters* v. *Daniel*, 439 U.S. 551 (1979) (noncontributory, compulsory pension plan was not a security in part because of the scheme for regulation of the plan under ERISA).

[23] Principles of deference apply even though the issue of interpretation affects an agency's jurisdiction. See *CFTC* v. *Schor*, 478 U.S. 833, 845 (1986); cf. *Dole* v. *United Steelworkers*, 110 S. Ct. 929, 944 (1990) (White, J., dissenting) (citing cases); *Missis-*

in its rehearing petition, however, that the court's deference to the CFTC in this particular case was flawed because the court only accepted the CFTC's conclusion, while rejecting its rationale. SEC C.A. Reh'g Pet. 10-11, citing *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). In particular, the SEC noted that the CFTC had urged that "bilateralism" was essential to find a futures contract, and, although the court of appeals agreed with the SEC that IPs lack bilateralism, Pet. App. 16, the court nonetheless purported to defer to the CFTC's bottom line that IPs were futures.

There are indeed passages in the CFTC's amicus curiae submissions to the court of appeals that, fairly read, characterize bilateralism as an essential aspect of a futures contract. CFTC C.A. Br. 8 (generally, in a futures contract "both parties to the contract are obligated to fulfill the terms of the contract at a specified price."); *id.* at 10 ("Besides futurity, IPs possess a second essential element of a futures contract: both parties to an IP are obligated to fulfill the contract at the specified price even though the contracts may be satisfied either by delivery or offset."). But clouding the issue is the fact that the CFTC found the element of "bilateralism" satisfied in this particular case. *Ibid.* The CFTC's understanding of that term, therefore, may not be wholly shared by the SEC and the court of appeals.

More fundamentally, this Court need not exercise its certiorari jurisdiction to decide whether the CFTC's process of reasoning was accurately understood by the court below. The CFTC did express the opinion that IPs are subject to its jurisdiction, and the language and purposes

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sippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring). Here, of course, the jurisdiction of each agency depended on the characterization of an IP under the applicable statutes; the SEC asserted jurisdiction by interpreting the securities laws to apply to IPs, while the CFTC claimed jurisdiction by interpreting the CEA to apply to IPs. Under 7 U.S.C. 2, in such a case, the CFTC's jurisdiction prevails (provided the CFTC's interpretation is reasonable and consistent with its statute).

of the statute are consistent with that view. Moreover, other sources of the CFTC's thinking support the position that each element of a classic futures contract need not be present to invoke its jurisdiction; the touchstone is the economic purpose and overall nature of the instrument. See *CFTC* v. *Co Petro Marketing Group, Inc., supra*; *In re Stovall, supra*. Accordingly, since the court of appeals correctly interpreted the CFTC's broader conclusions in this area, we do not believe that review of the issue of deference is necessary here.

The stock exchanges press the argument (89-1502 Pet. 19; 89-1503 Pet. 10) that "bilateralism" must be held essential to a futures contract in order to prevent the CEA's jurisdiction from sweeping in a host of other instruments whose value is realized in the future. For example, petitioners Amex, CBOE, and OCC claim that "options" cannot be distinguished from futures contracts absent bilateralism (89-1502 Pet. 19); petitioner Phlx makes the same claim about transactions in stock (89-1503 Pet. 10). Quite apart from the absence of a "bilateralism" requirement in the text of the statute, however, these arguments are unpersuasive.

Bilateralism is not the main distinction between options and futures. It is well recognized that the long in an option pays only a premium for the right to buy or sell the underlying interest; his exposure is accordingly limited to that sum. See N. Katzenbach, *An Overview of Program Trading and Its Impact on Current Market Practices* 7 (1987) ("The purchaser of the option, however, cannot suffer unlimited losses caused by movements in market price."). In contrast, the long in a futures contract has far greater exposure to loss resulting from price changes.[24]

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[24] Petitioners claim (89-1502 Pet. 18-20) that the court of appeals' analysis leaves no distinction between futures and options, but their method of reaching that conclusion is flawed. Petitioners isolate particular distinctions the court drew one-by-one, and claim that each is inadequate. Read as a whole, however, the court offered a concept of options as a distinct product offering "a careful balance among premium, strike price, and duration." Pet. App. 18.

As to the supposed need for bilateralism to distinguish stock transactions from futures transactions, it is sufficient to note that the seller and purchaser of stock in an ordinary exchange transaction intend to transfer the instrument, without any future contractual obligations. Economically, the sale of stock is purely a "cash" transaction; the typical five business days allowed for settlement does not detract from that characterization.[25] There is, therefore, no necessity to engraft a strict bilateralism requirement to distinguish the body of transactions traditionally covered by the securities laws from the type of instrument Congress intended to be regulated as a futures contract.[26]

2. In an effort to limit the coverage of the CEA, petitioners and the SEC have cited the provision in 7 U.S.C. 2 known as the "SEC savings clause." 89-1502 Pet. 21-22; 89-1503 Pet. 12 n.11; SEC C.A. Reh'g Pet. 5-8. That provision does not, in our view, justify limiting the CFTC's jurisdiction over IPs. The SEC savings clause appears immediately after the grant of exclusive jurisdiction to the CFTC over "contracts of sale * * * for future delivery" and states:

> *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission

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[25] Cf. Op. CFTC Gen. Coun., No. 85-2 [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,673, at 30,856 (1985) (two business day settlement period "for purposes of administrative convenience or necessity" did not convert a precious metals transaction into a futures contract, on the particular facts).

[26] Petitioners point (89-1502 Pet. 20) to a variety of more complex transactions (such as "European-style options," "zero-coupon bonds," "index warrants," and "variable annuities") as examples of instruments that are claimed to exhibit the same degree of futurity as IPs, and whose classification is therefore called into question by the court of appeals' opinion. Those instruments were not involved in this case (or discussed by the court even in dicta), and review is not warranted to discuss abstract principles that might or might not apply to them in some other case.

> or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws.

7 U.S.C. 2. The text of this provision sets forth no explicit substantive limitations on the CFTC's jurisdiction. Rather, its operative effect is expressly confined to provisions other than the CFTC's jurisdiction-granting language, which immediately precedes it. See Pet. App. 109.

Moreover, the legislative history of the SEC savings clause [27] does not indicate that the CFTC's jurisdiction over futures contracts should be read narrowly as applied to novel or unconventional products—which IPs surely are. That history reveals that Congress was particularly concerned with protecting the SEC's jurisdiction in its *traditional* areas of regulation. The history does not support the view that the concept of a "futures contract" should be given a narrow reading as applied to hitherto unknown financial products.

The original House bill provided both that the CFTC was to have exclusive jurisdiction over futures contracts and that nothing in the bill was to supersede the SEC's jurisdiction. H.R. 13113, 93d Cong., 2d Sess. § 201(B) (1974); H.R. Rep. No. 975, *supra*, at 3 (noting that SEC jurisdiction would be preserved "in those areas *traditionally* regulated by it") (emphasis added). The genesis of this provision was that prior to the 1974 amendments, regulation of trading in futures contracts was limited to specified agricultural commodities. The 1974 amendments proposed to expand the definition of "commodity" to cover any interest in which futures contracts were traded. To respond to the fact that "the expanded definition of 'commodity' * * * may include rights and interests which are

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[27] See generally Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 7-19 (1976); Greenstone, *The CFTC and Government Reorganization: Preserving Regulatory Independence*, 33 Bus. Law. 163, 205-208 (1977).

securities as defined in the federal securities laws," the House Report explained that "except in the area of transactions involving a contract market, the jurisdiction of the [CFTC] is intended to exist *concurrently* with the jurisdiction vested in the [SEC]." *Id.* at 28 (emphasis added).

The Senate, however, rejected the notion of concurrent jurisdiction set forth in the House bill. In its Report, the Senate Committee indicated that it desired to give the CFTC *exclusive* jurisdiction "with regard to the trading of futures on organized contract markets," without "infring[ing] on the jurisdiction of the [SEC] or other government agencies." S. Rep. No. 1131, *supra*, at 23. Accordingly, the Senate added a new preface to the savings clause: "'[E]xcept as hereinabove provided,' nothing contained [in the section] shall supersede or limit the jurisdiction at any time conferred on the [SEC]." *Id.* at 31. The Report explained that the purpose of this amendment was to "clarif[y]" that the CFTC's "jurisdiction over futures contracts markets or other exchanges is exclusive," such that the CFTC's "jurisdiction, where applicable, supersedes State as well as Federal agencies." *Id.* at 6, 23. That language removed any overlapping jurisdiction between the CFTC and the SEC.

The Senate version on this point prevailed in conference. See H.R. Conf. Rep. No. 1383, *supra*, at 35-36 ("Under the exclusive grant of jurisdiction to the Commission, the authority in the Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned"). The purpose of the SEC savings clause was to clarify that the broadened definition of commodity "was not intended * * * to apply to trading in interests and rights traditionally known as securities, including, for example, stocks, corporate bonds, warrants, and debentures," but that the CFTC was authorized to exercise exclusive regulatory jurisdiction over the futures markets. 120 Cong. Rec. 34,737 (1974) (remarks of Rep. Poage); *id.* at 34,997 (remarks of Sen. Talmadge).

Interpreted in light of its history, the savings clause does not provide a basis for narrowing the CFTC's jurisdiction over novel instruments that fall outside of "traditional" SEC and CFTC domains. Congress did, of course, express an intention not to infringe on the SEC's jurisdiction over instruments it traditionally regulated. Indeed, the court of appeals recognized a similar principle. Pet. App. 14 ("if IPs are really 'stock,' they almost certainly are not 'futures contracts' "). But no such principle applies to IPs. Although the SEC's order reasoned that IPs are "stock" based on the analysis in *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681 (1985), see Pet. App. 49-50, the court of appeals strongly suggested that IPs cannot be viewed as stock because they lack an issuing entity in which the holder owns an equity interest. *Id.* at 14-15. Although other terms in the statutory definition of "security" may very well apply to IPs, we share the court's doubts that IPs can be fit within the definition of "stock." [28] In any event, there is no evidence that "synthetic" securities such as IPs are what Congress had in mind when it drafted the SEC savings clause.[29] The savings clause is simply silent on the proper classification of such an instrument. To the extent that the IP is a novel instrument qualifying as both a "futures contract" and as a "security," the jurisdictional provisions call for exclusive regulation by the CFTC.

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[28] The Court in *Landreth* was concerned with describing the characteristics of "common stock" as found in an instrument that bears the name "stock." 471 U.S. at 681; *id.* at 688 (describing the instruments before it as "traditional stock"); see also *Reves* v. *Ernst & Young*, 110 S. Ct. at 950 ("common stock is the quintessence of a security"). IPs, of course, are not called "stock" and cannot be viewed as interests in a business enterprise in the sense that common stock is such an interest.

[29] Indeed, Congress has, since the 1974 amendments, rejected proposals by the SEC to remove futures trading in indexes of securities from the exclusive authority of the CFTC. See S. Rep. No. 850, 95th Cong., 2d Sess. 21-23 (1978) (accompanying CFTC reauthorization bill); *id.* at 22 (noting that Congress had recognized in 1974 that "futures markets would not remain static," and

3. Petitioners Amex, CBOE, and OCC contend (89-1502 Pet. 22-24) that the court of appeals erred in failing to hold that the SEC has jurisdiction over IPs pursuant to 15 U.S.C. 78i(g), which provides that "[n]otwithstanding any other provision of law, the [SEC] shall have the authority to regulate the trading of any put, call, straddle, option, or privilege of any * * * group or index of securities (including any interest therein or based on the value thereof)." Review of that question is not warranted because the SEC itself did not rely on 15 U.S.C. 78i(g) in its order permitting the trading of IPs. See *SEC* v. *Chenery Corp.*, 318 U.S. at 92-95.

The SEC canvassed a number of bases in 15 U.S.C. 78c(a)(10) in determining that IPs were "securities." The SEC found that IPs were "stock"; "certificate[s] of interest or participation in" stock; and "instrument[s] commonly known as a security." Pet. App. 47-53. The SEC also alluded to the possibility of analyzing IPs as receipts for interests in securities, or as investment contracts, which are also enumerated types of securities in the statutory definition. *Id.* at 48 n.47. In passing, the SEC stated that IPs had some characteristics that resemble features of "rights to purchase or puts or calls on a security or index of securities," but concluded that "IPs predominantly have the attributes of a portfolio of common stock." *Id.* at 52.[30] In the face of this survey, the lack of any plain statement that IPs might fall within 15 U.S.C. 78i(g) is a conspicuous omission. Indeed, the SEC did not rely on Section 78i(g) in its opening brief

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stating that "the basic conclusion reached in 1974 that there should be a single regulatory agency responsible for futures trading is as valid now as it was then"). Again, in 1983 when Congress enacted legislation to implement the SEC-CFTC jurisdictional accord, it confirmed that the CFTC had exclusive jurisdiction over futures contracts based on the value of an index of securities. 7 U.S.C. 2a(ii).

[30] The only option-like characteristics to which the SEC pointed were the cash-out and physical-delivery features of IPs. Pet. App. 52.

in the court of appeals. Not until its reply brief did the SEC inform the court that it accepted petitioners' view that Section 78i(g) applied; even then, the SEC qualified its position by stating "that the cash-out privilege in every IP (as distinguished from the IP itself) is an 'option or privilege' on an index, placing the IP within the statutory jurisdiction of the SEC." SEC C.A. Reply Br. 10-11.

Although the SEC is not foreclosed from considering the application of Section 78i(g) to IPs, this Court should not review that issue on the present record. The Court has frequently admonished that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Company Institute* v. *Camp*, 401 U.S. 617, 628 (1971); *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 143 (1984 ("*post hoc* rationalizations by counsel for agency action are entitled to little deference"). Here, the SEC did not explicate the relationship of 15 U.S.C. 78i(g) to IPs in its administrative order or indicate that it based its action on that provision; consequently, this Court does not have the benefit of the considered analysis of the issue by the responsible agency.[31] Because the SEC should address the ramifications of applying Section 78i(g) to IPs in the first instance, review should not be granted to address that issue.[32]

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[31] The court of appeals (properly) did not decide the question either. The court indicated that "IPs convey privileges based on the value of an index" and thus the "closest match" in the definition of a security to an IP may be the language added in the Accord, Pet. App. 15, but it also expressed the view that IPs are not "options," *id.* 17-18.

[32] We note, without expressing a view on the matter, that applying Section 78i(g) to IPs raises questions that underscore the desirability of prior SEC consideration. Section 78i(g) was added to the securities laws to confirm the SEC's jurisdiction over stock index options. See H.R. Rep. No. 626, *supra*, Pt. 1, at 9, 12. It is unclear whether the word "privilege" in that section was intended to encompass a different type of interest from an "option,"

B. Petitioners contend that this Court's review is needed to alleviate the "quandary" facing participants in the financial markets regarding which system of regulation—that of the CFTC or SEC—will apply to innovative new products. 89-1502 Pet. 15; 89-1503 Pet. 6-7. In petitioners' view, the court of appeals' decision is so open-ended that it creates confusion over the tests for identifying a futures contract. This uncertainty, it is feared, will inhibit the development, approval, and marketing of new products in the Nation's financial sector. *Ibid.* Petitioners raise a concern—shared by the SEC—that such regulatory obstacles will impede the Nation's financial markets in international competition.[33] Although we do

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such as the IP holder's cash-out privilege. That interpretation would give to the term "privilege" a quite distinct connotation from the other terms listed in the section, a "put," "call," "straddle", or "option." Cf. *Dole* v. *United Steelworkers,* 110 S. Ct. 929, 935 (1990) ("The traditional canon of construction, *noscitur a sociis,* dictates that 'words grouped in a list should be given related meaning.'"). Furthermore, if the IP holder has a "privilege" on the index because of the cash-out feature, perhaps the same could be said of the long in a stock index futures contract; but that conclusion would conflict with the distinction between futures and options intended by Congress. Before these issues are addressed by this Court or any other, the SEC should be given a chance to articulate its views and explain the reasons supporting the application of Section 78i(g) to IPs.

[33] For example, petitioners state (89-1502 Pet. 15 n.18) that IPs are being traded on the Toronto Stock Exchange. (We understand that the Canadian product, the Toronto 35 Index Participations Units (TIPs), consists of units of a trust created by a stock exchange that holds, as underlying assets, the securities in the index. As such, these "units" are quite different from the contracts formed by the purchase and sale of IPs.) Reports have also circulated that a product bearing similarities to IPs will be offered in the United Kingdom. See *Citibank Plans UK Cash Basket Products,* Financial Times, Dec. 14, 1989.

We note, however, that the holding here allocating jurisdiction over IPs to the CFTC did not doom that product not to be traded; the CFTC proposed to cooperate with the SEC in authorizing the trading of IPs as futures contracts. See Statement of Dr. Wendy L. Gramm, Chairman, CFTC, Before the Securities

not minimize the importance of maintaining regulatory clarity, or the detrimental consequences that may flow from regulatory confusion, we do not believe that those problems can effectively be addressed by this Court's review of the question presented in this case.

To begin with, the Seventh Circuit's opinion need not be read, as petitioners fear, as a harbinger that the CFTC has jurisdiction to regulate any product with "an element of futurity," regardless of all other factors. 89-1503 Pet. 6; *id.* at 7 (finding flaws in the opinion when read with "the broadest possible scope"). The methodology of the court of appeals suggests otherwise. The court compared the particular characteristics of IPs to the recognized paradigms of futures contracts and securities; it acknowledged that IPs did not fit squarely within either model; but it ultimately found that IPs had every element of a financial futures contract save for "bilateralism." Pet. App. 21. Although the court refused to give the CEA a cramped reading that would effectively freeze the CFTC's jurisdiction to products known in 1974, the court did note that there are direct, substantial limitations on the concept of a futures contract. For example, the court made clear that products that are genuinely "stock" cannot be futures, Pet. App. 14, nor are products that are "options," *id.* at 18.

The court of appeals did not, of course, write a treatise to govern the categorization of all financial instruments, and some new hybrid or synthetic products will inevitably pose difficult problems of classification. But there is no reason to interpret the court's opinion as putting in doubt the settled regulatory treatment of a host of distinct financial products that were not at issue in that case.[34] In any event, petitioners' proposed limiting princi-

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Subcomm. of the Senate Comm. on Banking, Housing, and Urban Affairs 28-29 (Mar. 29, 1990) (describing proposals to authorize trading in IPs by cross-registration of securities account executives and futures associated persons).

[34] Indeed, the court was careful to reserve the question whether "an IP with a daily cash-out feature at no penalty" was a futures

ple—that the CFTC's jurisdiction should be defined principally by reference to "the types of futures contracts described in the legislative history that accompanied the enactment of the exclusive jurisdiction clause," 89-1502 Pet. 22—finds no support in the language or policies of the CEA, and would open the statute to ready evasion.

In the current, dynamic financial environment, the goal of achieving legal clarity, which petitioners—and the SEC—understandably desire, may prove elusive. Justice Holmes' admonition that "[c]ertainty generally is illusion, and repose is not the destiny of man" rings true in this area. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 461, 466 (1897). "The boundaries of financial markets, from the demarcation between banking and investing to the presumably slighter distinction between any two given instruments, defy precise delineation." N. Katzenbach, *supra*, at 3. Indeed, prior to the decision in this case, commentators noted the difficulty in drawing lines between the CFTC and SEC's authority in view of the proliferation of new and complex financial instruments.[35] To the extent that such ambiguities are inherent in the statutes, however, predictable tests are likely to be achieved only through development of the case law, the issuance of administrative regulations, or congressional action. Earlier this Term the Court remarked, in explicating the meaning of the term "note" under the federal securities laws, that "[o]ne could question whether, at the expense of the goal of clarity, Congress overvalued the goal of avoiding manipulation by the clever and dishonest. If Congress erred, however, it is for that body, and not this Court, to correct its mistake." *Reves* v.

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contract. Pet. App. 110. That reservation demonstrates not the "illogic" of the court's position (see 89-1503 Pet. 9), but its restraint. The reservation of the proper legal status of a product with such a minute difference from the IPs before the court underscores the limited nature of the court's holding.

[35] See Gilberg, *supra*, 39 Vand. L. Rev. at 1686 (noting the "definitional ambiguities in the law" and pointing out that the "question of which of the two agencies has jurisdiction over a specific product is very often itself unclear").

Ernst & Young, 110 S. Ct. at 950 n.2. A similar point well applies, in our view, to the statutory concept of a futures contract.[36]

Recognizing the potential for uncertainty, the CFTC has sought to provide detailed guidance to the financial community with respect to the scope of its jurisdiction in certain areas. See *Regulation of Hybrid Instruments*, 54 Fed. Reg. 1128 (1989) (proposed rules); 54 Fed. Reg. 30,684 (1989) (final rules); *Policy Statement Concerning Swap Transactions*, 54 Fed. Reg. 30,694 (1989); *Statutory Interpretation Concerning Certain Hybrid In-*

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[36] Congressional committees are currently exploring the policy issues raised by the allocation of jurisdiction between the CFTC and the SEC, including issues raised by this case. Hearings were held before the Securities Subcommittee of the Senate Committee on Banking, Housing, and Urban Affairs on March 29, 1990, the House Committee on Agriculture on May 8, 1990, and the Telecommunications and Finance Subcommittee of the House Committee on Energy and Commerce on May 24, 1990. At those hearings, the Chairmen of the SEC, CFTC, and the Federal Reserve Board, as well as the Under Secretary of the Treasury for Finance, testified regarding the broader issues stemming from the division of authority between the CFTC and SEC, and the narrower issue whether the regulation of stock index futures should be transferred from the CFTC to the SEC. Under Secretary Robert R. Glauber stated in his May 8, 1990, statement to the Senate Agriculture Committee (at p. 10) that "[r]egulatory competition also begets jurisdictional squabbles, which can strangle innovation. New products are not merely stifled; they quickly move to overseas markets."

Several bills are pending in Congress that deal with these issues. See H.R. 3662, 101st Cong., 2d Sess. (1989) (intended to transfer jurisdiction over stock index futures to the SEC); H.R. 4477 (intended to consolidate regulation of securities and futures in a single agency); S. 2335 (intended to require appointment of one SEC commissioner to CFTC and one CFTC commissioner to SEC) (both in 101st Cong., 2d Sess. (1990)). The issue is receiving high-level attention under the aegis of the President's Working Group on Financial Markets, consisting of representatives of the SEC, CFTC, Federal Reserve Board, and the Treasury Department. On May 8, 1990, the Secretary of the Treasury advised the Senate Agriculture Committee of the Administration's support for a bill that would, among other things, shift regulatory authority for stock index futures to the SEC and modify the CEA's "exclusivity" clause.

struments, 55 Fed. Reg. 13,582 (1990) (regarding instruments that combine characteristics of futures contracts or commodity options with debt or certain equity interests). The issuance of these statements reflected the CFTC's recognition that "the proliferation of hybrid instruments incorporating futures or commodity option elements in innovative formats has caused uncertainty as to the regulatory status of such instruments." The rules proposed by the CFTC were thus intended "to ensure that existing regulatory structure[s] do not unnecessarily retard growth or innovation or fail to provide protections that are responsive to market developments." 54 Fed. Reg. 1128 (1989). Although the CFTC's statements do not purport to address all interpretive questions under the CEA, they diminish somewhat the need for the judiciary to take on the unaccustomed role of furnishing comprehensive answers in this area.

In sum, the proper interpretation of the CFTC's jurisdiction is an important question that this Court has not had an occasion to address.[37] We believe, however, that the question was answered correctly below. The many issues that lie beyond the periphery of this case do not require this Court's present attention.[38]

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[37] Indeed, the courts of appeals have had comparatively few opportunities to interpret the CEA in this context. See 89-1502 Pet. 11 (characterizing issues presented as "a matter of first impression"). For IPs, however, the court of appeals' decision is in effect a national precedent; the reversal of the SEC's order precludes the further marketing of the product as a security. We note that this aspect of the SEC/CFTC controversy may give the Seventh Circuit a disproportionate influence over the development of this field of law. For historic reasons, Chicago is home to many of the nation's futures exchanges, and those parties can therefore bring their challenges to SEC orders in the Seventh Circuit, as they did here. See 15 U.S.C. 78y. Circuit conflicts may accordingly be slow to develop.

[38] As to the ICI's "conditional" petition for certiorari, we believe that the Court should deny it as well. If the Court grants the petitions for certiorari in Nos. 89-1502 and 89-1503, the ICI petition should be held for disposition in light of those cases. The court of appeals never addressed the question whether IPs are governed by the Investment Company Act, and this Court would be benefitted by the airing of those issues in that court as an initial matter.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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